

FILED

U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

DEC 19 2016

BEAUMONT DIVISION

BY
DEPUTY _____

Joseph Franklin Smith Sr.,

Petitioner,

Date:

Case No.

Case No. 1:01-cr-31

v.

United States,

Respondent.

MEMORANDUM OF LAW IN SUPPORT OF
REVIEW OF HARMLESS ERROR
(28 U.S.C. 2111). WRIT OF ERRORS

COME NOW petitioner, pro'se, requesting this Honorable District Court grant review of harmless error for the following reasons:

A. FACTS.

1. On 11/26/2001, first, the petitioner plead guilty to the greater charge, to count 5, of his indictment and the lesser charge, count 4, was dismissed by the government. Second, in his plea agreement, he agreed to only ~~was~~ waiving his rights to appeal counts 4 and 5; ~~however~~ however, at the plea hearing

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the plea was changed to ~~waver~~ waiving appeal of counts 1, 2, and 3. Third, no where in the petitioner plea was there any mentioning of the mandatory minimum penalty.

B. AUTHORITY TO REVIEW.

1. According to Federal Rules of Criminal Procedures, Rule 52(b), A plain error that affects substantial rights may be considered even though it was not brought to the attention of the court, reversible error, see also Fed. Rule Evid, RULE 103(e). So this review is timely.

C. Law in Conformity with Facts.

1. According to Federal Rules of Criminal Procedure Rule 11(H), variance from the requirements of Rule 11 are considered only when an error effect substantial rights. A substantial right is the 5th Amendment of the United States Constitution (no person shall be deprived of liberty without "due process of law"). Accordingly, the petitioner plea agreement and plea hearing must be in accord with Rule 11 to provide the petitioner with "due process of law" and not effect substantial rights.

2. First, according to Rule 11(b)(1)(B), petitioner must be informed and understand the right to plea, or having already so plead, to persist in that plea; second, according to Rule 11(b)(1)(I), petitioner must be informed and understand

any mandatory minimum penalty; and third, according to Rule ~~11(c)(1)(A)~~ 11(c)(1)(A), the government ~~shall~~ agrees to have the petitioner plea guilty to a lesser or related offense while specifying it will not bring, or will move to dismiss, greater charges.

3. According to Rule 11(b)(1)(B) above, the petitioner was not informed or did not understand his right to persist with his initial appeal waiver, i.e. persist with the appeal waiver of count 4 and 5 instead of including counts 1, 2, and 3 at the plea hearing.

4. According to Rule 11(b)(1)(E) above, the petitioner was not informed or understood his right of pleading to any mandatory minimum penalty (his plea agreement or plea hearing does not mentioned the mandatory minimum penalty).

5. According to Rule 11(c)(1)(A) above, the petitioner was not informed or understood and/or the Government did not agree to have the petitioner plea guilty to count 4, the lesser offense, instead of count 5, the greater offense.

6. Accordingly, these errors above effects the 5th Amendment (due process of law). ~~7th~~ The 5th Amendment is a substantial right, therefore, the petitioner petition to have his plea, in accordance with Rule 11 above, withdrawn.

D. Conclusion

1. As a result, the petitioner petition this Honorable District Court for a review of harmless error/plain error to withdraw his plea agreement.

Sincerely,

Joseph F. Smith 12/15/2016

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Joseph F. Smith 12/15/2016

TRULINCS 97499079 - SMITH, JOSEPH FRANKLIN - Unit: SPG-H-P

FROM: 97499079

~~TO: News, Legal~~ *WRIT OF ERROR*

SUBJECT: Petition for Review/Writ Harmless Error

DATE: 12/09/2016 07:23:26 PM

Name: Joseph Franklin Smith Jr.

Prison Identification/Booking No: 97499-079

Address or Place of Confinement: Medical Center for Federal Prisoners, P.O. Box 4000, Springfield, Mo. 65801

United States District Court

Eastern District of Texas

Beaumont Division

Joseph Franklin Smith Jr.,
Petitioner,

v.

United States,
Respondent.

Case No.

Case No. 1:01-cr-31

Petition for Review/Writ of Harmless Error (28 U.S.C. 2111)

This Petition Concerns: A plea Agreement, 11/26/2001

The Acts Committed: (1) 18 U.S.C. 371, (2) 18 U.S.C. 1951, (3) 18 U.S.C. 924C and (5) 18 U.S.C. 924C.

The Sentence Date and Terms of the Sentence: 04/19/2002, count 1-2: 41 months, count 3: 120 months, count 5: 300 months.

Did you appeal from the judgment of conviction or the imposition of sentence? Yes.

Give the following information for each appeal: (1) name of court, 5th Circuit Court of Appeals, (2) Result, denied, (3) Date of Result, 02/09/2005, (4) Grounds Raised, the robbery did not effect interstate commerce.

GROUND IN THIS PETITION

Ground one: I did not plea guilty to the lesser count instead I plead guilty to the most greater count.

Supporting Facts: In my plea agreement on 11/26/2001 the prosecutor had me plea guilty to count 5: 18 U.S.C. 924C and dismissed count 4: 18 U.S.C. 2119. Pleading guilty to 18 U.S.C. 924C give a mandatory sentence of 25 years. Pleading guilty to 18 U.S.C. 2119 give me a sentence of 7 years totally, see plea hearing transcripts.

Ground two: After pleading guilty , at the plea hearing THE PROSECUTOR CHANGED THE PLEA to denying me the right to appeal counts 1,2, and 3.

Supporting Facts: See plea hearing transcripts appeal waiver

Ground three: Before the plea and during the plea I was not told of the mandatory minimum penalty.

Supporting facts: see plea hearing transcripts and plea agreement contract.

Wherefore, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding. *JS*

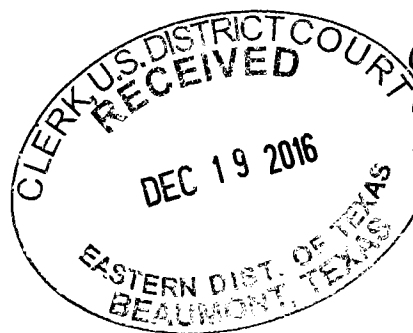
I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Joseph F. Smith 12/15/2016

Joseph F. Smith Sr. 97499-019
Medical Center for Federal Prisoner.
P.O. Box 4000
Springfield, Missouri 65801-4000

SPRINGFIELD MO 658

15 DEC 2016 PM 31



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